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Supreme Court, U.S.
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No. 02-1151

In The

Supreme Court of the United States

INTERSTATE POWER COMPANY,

Petitioner,

vs.

DANIEL MARTINS and
COLEEN MARTINS,

Respondents.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

REPLY BRIEF

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QUESTIONS PRESENTED IN REPLY TO MARTINS' BRIEF IN OPPOSITION

1. Does this Court have jurisdiction to consider and grant Interstate's Petition for Writ of Certiorari?

2. Because a Federal question is involved, may this Court properly review what the Martins claim is simply a matter of state common law?

3. Is the grant of Interstate's Petition for Writ appropriate on the ground of the importance of the issue presented?

4. Because the Martins' Brief in Opposition relies solely on jurisdictional objections and fails to urge any other ground, should the Martins be deemed to have waived objection to the questions presented by Interstate?

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STATEMENT OF THE CASE

The Martins have asserted in their Brief in Opposition that "Interstate's Statement of the Case misstates a number of aspects of the record in this case. . . . " As to those specific allegations, in response Interstate respectfully submits:

(1) The Martins suggest that Interstate's reliance on the Appendix for the proposition that stray voltage is inherent in the delivery of electrical service is a misstatement, and rely on the testimony of Mr. William English who was their engineering expert. However, Mr. English testified that stray voltage would not be inherent in the delivery of electricity if people generated their own electricity. (App. p. 115). Interstate did not misstate the record. (See also, App. p. 9). People do not generate their own electricity. Electrical service is delivered by utilities, as it was in this case. This case is about the delivery of electrical service, and the proposition that stray voltage is inherent in that delivery is acknowledged by the witness. He merely goes on to add an alternative he knows to be implausible.

(2) As to the Wye distribution system, its relevance to this case, and whether it is mandated by the Code, the evidence relied upon by the Martins to support their claim of nuisance was testimony of stray voltage claimed to result from Interstate's use of a multi-grounded Wye distribution system. (App. pp. 116-117). According to the undisputed testimony presented by the Martins themselves, and affirmed by Interstate's electrical experts, the multi-grounded Wye distribution system (and not the alternatives offered by the Martins in their Brief in Opposition) is used everywhere in this country, by every utility, every commission that regulates those utilities, and by every state except for "part of California, maybe Florida and one city in Michigan." (App. pp. 116-118). Liability in this case was assessed against Interstate for one reason – the use of the multi-grounded Wye distribution system, specified and approved by the Iowa Legislature, the Iowa Utilities Board and the Code of Iowa, as well as the National Electric Safety Code. (App. pp. 46-52), and on the theory of nuisance alone, for a condition indisputably inherent in the delivery

of electrical service, with no claim or evidence of negligence (App. pp. 5-8) since Interstate's lines were in complete compliance with Code requirements. (App. pp. 114-118). Those are the facts, supported by the record, and Interstate did not misstate the record. However, it may further assist the Court if the Appendix citation is expanded through 118.

(3) The Martins assert that because the Code requirements are stated as minimum requirements, that Interstate misstated the record by showing that it had complied with those requirements. While it may be argued that all of law presents no more than minimum requirements, compliance with the law as stated, whether or not it be stated as a minimum, is compliance, and Interstate correctly cited that its lines were in compliance with Code requirements. Again, however, though Interstate cited pages 114-115 of the Appendix in support of this statement, it may assist the Court if the citation is expanded an additional three pages, to 118 of the Appendix.

(4) The Martins state that Interstate "did not tell this honorable Court that the easement was never pleaded as a defense." While easement was not pled initially as a defense, the record is clear that Interstate subsequently requested and was granted leave to amend to conform to proof, and the trial court took judicial notice of the easement. (App. p. 33). Interstate did not misstate the record, and neither did it mislead or attempt to mislead the Court in any way.

(5) While strict liability was "not the theory propounded to the jury" by name, it was the theory propounded in fact to the jury, as evidenced not only by Interstate's argument, but by the Dissent, wherein it is stated, "The effect of the majority of the decision is to impose a form of strict liability on a utility in a stray voltage case." (App. p. 18).

Wherefore, in all respects, Interstate reasserts, without repeating herein, its original Statement of the Case.

ARGUMENT

A. THIS COURT HAS JURISDICTION TO CONSIDER AND GRANT INTERSTATE'S PETITION FOR WRIT OF CERTIORARI.

1. The United States Supreme Court Has Appellate Jurisdiction To Review Decisions Of State Courts Within The Limits Prescribed By The Acts Of Congress.

The Supreme Court has the authority to review decisions of the State Courts of last resort 28 *USCA* §1257. That Appellate power is supported by both the letter and the spirit of the Constitution. *England v. Louisiana State Board of Medical Examiners*, 84 S. Ct. 461, 375 U.S. 411, 11 L. Ed. 2d 440 (1964). Jurisdiction of the Supreme Court of the United States includes the power to review the decisions of the highest court of the state in which a decision may be had. *Gotthilf v. Sills*, 84 S. Ct. 187, 375 U.S. 79, 11 L. Ed. 2d 159 (1963). Therefore, the Supreme Court has the jurisdiction to review this decision of the Iowa Supreme Court, so long as the review is within what has been prescribed by Congress.

2. The United States Supreme Court May Review The Decision Of The Iowa Supreme Court If A Federal Question Was Raised.

Durley v. Mayo, 76 S. Ct. 806, 351 U.S. 277, 100 L. Ed. 1178, *rehearing denied*, 77 S. Ct. 22, 352 U.S. 859, 1 L. Ed. 2d 69 (1956). That is, so long as a Federal question was raised, this Court has jurisdiction to review this decision of the Iowa Supreme Court.

3. Interstate Raised Federal Questions With The Iowa Supreme Court.

In its Petition For Rehearing, page 7, Interstate specifically asserted its rights under the United States Constitution. (App. pp. 54-56). It is proper for the United States Supreme Court to review decisions of state courts

involving claims that petitioners have been denied due process of law and equal protection of law. *Napue v. People of State of Illinois*, 79 S. Ct. 1173, 360 U.S. 2643, 3 L. Ed. 2d 1217 (1959); *Copperweld Steele Company v. Industrial Commission of Ohio*, 65 S. Ct. 1006, 324 U.S. 780, 89 L. Ed. 1363 (1945). Interstate specifically raised the issue of due process under the United States Constitution at pages 7-9 in its Petition For Rehearing, and asserted its right to equal protection under the law at page 10 of the same document. (App. pp. 54-57).

4. The Iowa Supreme Court Ruled On The Questions Presented.

The Iowa Supreme Court did not dismiss Interstate's Petition For Rehearing, but rather ruled on it, and specifically, "overruled" and "denied" it. (App. p. 43). It is sufficient to raise the Federal question in a Petition for Rehearing in state court if the Court entertains the motion and decides the question. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 77 L. Ed. 360, 53 S. Ct. 145, 85 A.L.R. 254 (1932); *Fleming v. Fleming*, 264 U.S. 29, 68 L. Ed. 547, 44 S. Ct. 246 (1924). The United States Supreme Court will review Constitutional questions presented to it on appeal from a state court judgment when the state court has had an opportunity to rule on the question. *Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 2d 517, 72 S. Ct. 380, 27 A.L.R. 2d 472 (1952). *Adams v. Robertson*, 520 U.S. 83, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997). The Iowa Supreme Court was presented with the Constitutional questions raised by Interstate, had the opportunity to rule, and did – "overrul[ing]" Interstate on those questions.

Martins argue that jurisdiction does not lie because they find nothing in the record at the trial court level regarding the Constitutional questions, but if a Federal question is raised in the highest court of the state, and there considered and passed upon, the right of review by the United States Supreme Court exists, regardless of whether such question was raised in the trial court. *Whitfield v. State of Ohio*, 297 U.S. 431, 80 L. Ed. 778, 56 S. Ct. 532, (1936). *Ward v.*

Monroeville, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972). The Supreme Court will review a Federal question, although it was not put in issue by the pleadings or directly passed on in the opinion, where it is apparent both from the pleadings and the record that the decision in the State Court could not have been reached except by disposing of the question. *Toledo, St. L. & W.R. Co. v. Slavin*, 236 U.S. 454, 59 L. Ed. 671, 35 S. Ct. 306 (1915).

Further, while it is recognized that the United States Supreme Court may review the decision of a state court if a Federal question is presented, the United States Supreme Court may properly review the judgment of a state court decision if a Federal question was necessarily involved in its judgment. *Durley v. Mayo*, 351 U.S. 277, 100 L. Ed. 1178, 76 S. Ct. 806, *rehearing denied*, 77 S. Ct. 22, 352 U.S. 859, 1 L. Ed. 2d 69 (1956). *See also*, *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206, 82 L. Ed. 751, 58 S. Ct. 528 (1938). Throughout the record it is apparent that Interstate seeks only the benefits to which it is entitled under the law, to those benefits accorded under the law to all citizens, and that Interstate is aggrieved that it has not received them. (App. pp. 54-57). For example, Interstate pointed to the earlier decisions of the Iowa Court regarding easement as an absolute defense, but denied to Interstate; to the earlier decisions of the Iowa Court refusing application of strict liability to utilities while applying it to Interstate in this case; to denying Interstate the use and benefit of its contractual easement, despite the evidence of the easement; and arguing the Iowa Court's violation of the separation of powers doctrine, citing an Iowa case that cites a United States Supreme Court case, making it clear that questions as to the reasonableness of regulations (such as those involved here) are not for the courts, but for the Legislature, and not to be set aside because the Court disagrees. (App. pp. 46-52). Therefore, even if Interstate had not specifically mentioned the Constitutional implications by name (which it did), considerations of them were necessarily involved in the Iowa Supreme Court's judgment, and this Court may properly review that judgment.

5. Because A Federal Question Was Considered And Decided By The Supreme Court Of Iowa, The Time At Which, Or The Method By Which, The Question Was Presented Is Immaterial To Interstate's Right To Review In The United States Supreme Court.

Where a Federal question has been considered and decided by the state court of last resort, the time at which or the method by which, the question was presented is immaterial as to the right to a review in the United States Supreme Court. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175, 2 A.L.R. 3d 1254, *clarification denied*, 84 S. Ct. 439, 375 U.S. 950, 11 L. Ed. 2d 312 (1963). Even if the Constitutional implications of the Court's decisions had not been considered until Interstate's Petition For Rehearing, because they were specifically presented, the time or the method by which they were presented is immaterial to Interstate's right to review in this Court.

6. Whether The Iowa Supreme Court Decided A Federal Question Is In Itself A Federal Question For The United States Supreme Court To Determine.

Lovell v. Griffin, 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666 (1938). The question presented in their Brief in Opposition by the Martins, in and of itself, presents a Federal question.

B. BECAUSE A FEDERAL QUESTION IS INVOLVED, THIS COURT MAY PROPERLY REVIEW WHAT THE MARTINS CLAIM IS SIMPLY A MATTER OF STATE COMMON LAW.

1. The Supreme Court Will Review A Decision Involving A State Court Interpretation Of That State's Common Law When A Federal Question Is Involved.

Martins assert that because the Iowa Supreme Court is the final arbiter of Iowa common law, this Court lacks

jurisdiction to grant Interstate's Petition for Writ. While, as a general rule, the Supreme Court of a state may administer the common law according to its own interpretation, without being subject to review in the United States Supreme Court, review by this Court is not precluded if a right arising under the Federal Constitution or law has been asserted and denied. *American R. Express Co. v. Kentucky*, 273 U.S. 269, 71 L. Ed. 639, 47 S. Ct. 353 (1927). *See also*, *Ferris v. Frohman*, 223 U.S. 424, 56 L. Ed. 492, 32 S. Ct. 263 (1912).

2. Review Of This Decision By The Iowa Supreme Court Is Not Precluded By The Fact That Other Grounds Are Also Stated In The Iowa Court's Decision.

If it appears that the decision did rest on a ground involving a Federal question, review is not precluded by the fact that other grounds are stated in the decision. *State Tax Com. v. VanCott*, 306 U.S. 511, 83 L. Ed. 950, 59 S. Ct. 605 (1939); *Abie State Bank v. Bryan*, 282 U.S. 765, 75 L. Ed. 690, 51 S. Ct. 252 (1931). In *Ferris v. Frohman*, 223 U.S. 424, 56 L. Ed. 492, 32 S. Ct. 263 (1912), the respondents [much like the Martins] contested the jurisdiction of the Supreme Court on the ground that the bill was based entirely upon a common-law right, and insisted that the upholding of the right by the state court raised no Federal question. The Court said the fact that the state court reached its conclusion on common-law principles did not alter the effect of the decision; the petitioner was denied Federal rights. Likewise, in this case, that the Iowa courts reached their conclusions by speaking much of the common law of nuisance and little of the Constitutional issues and implications, does not change the effect; Interstate was denied rights guaranteed it under the Constitution.

Therefore, because a Federal question is involved, this Court has jurisdiction over, and may properly review, this cause.

C. THE GRANT OF INTERSTATE'S PETITION FOR WRIT IS APPROPRIATE ON THE GROUND OF THE IMPORTANCE OF THE ISSUE PRESENTED.

The Supreme Court has granted Certiorari when important questions of law have been presented and should be settled by this Court. *See, e.g.*, *Pate v. Robinson*, 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 19 L. Ed. 2d 787, 88 S. Ct. 651 (1968). In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956) Certiorari was granted because of the wide application of the case and the conflicting views that had been or could be expressed. In *FTC v. American Tobacco Co.*, 274 U.S. 543, 71 L. Ed. 1193, 47 S. Ct. 663 (1927) issuance of a Writ of Certiorari was justified by the probability that the opinion below would seriously hinder the future administration of law. Certiorari was granted in *The Tungus v. Skovgaard*, 358 U.S. 588, 3 L. Ed. 2d 524, 79 S. Ct. 503 (1959) largely to consider the relationship between maritime and local law in cases of that kind. While jurisdiction with this Court in those cases may have lain under different Code provisions, when important issues are presented, the seriousness of the issue appears to be a sort of supplementary jurisdictional issue.

In this case, Interstate urges this Court to exercise its jurisdiction because the ruling by the Iowa Supreme Court imposing strict liability against this multi-state electrical utility for its use of a particular legislatively-approved electrical distribution system collectively burdens and interferes with the multi-state transmission and distribution of electricity and negatively impacts interstate commerce; because the principles of justice inherent in due process and equal protection require restraining government so that one branch of government may not compel a citizen to act in a prescribed manner, while another branch of the same government holds the citizen strictly liable for doing so; because the Iowa Supreme Court's refusal to accept the Iowa Legislature's standard of multi-grounded Wye distribution systems is a violation of the

separation of powers doctrine and an improper exercise of police power from which Interstate has no other avenue of redress or protection; and because the rulings of the Iowa Appellate and the Iowa Supreme Court, identifying no state interest advanced for refusing to acknowledge Interstate's easement, its property rights in its multi-state transmission and distribution systems, and its investments made in reliance on and in compliance with all applicable state and national codes, constitute a governmental taking without compensation. These are concerns not just personal to Interstate, but to all utilities in the State of Iowa, as evidenced below by the Amicus participation of Iowa's electrical entities and associations. (App. pp. 79-85). But because the use of electricity is national in character and the method of its transmission and distribution is very nearly uniform nationally, a single uniform and uniformly enforceable rule is vitally necessary so that the unimpeded flow of electricity throughout these connecting national systems is not obstructed by one state's description as "unreasonable interference" of the use of the very system that provides for that unimpeded flow, in nearly all of the rest of the nation. Without that unimpeded flow we run the risk of varied and various rulings, with cumulative burdens imposed on very nearly every one of this country's electrical utilities, resulting in a direct burden on interstate commerce and resulting in either oppressive economic burdens borne by the citizen electrical consumers, or perhaps resulting in the complete breakdown of the electrical service network upon which our national lives and survival have become dependent. Interstate respectfully submits that this is one of those cases so important, so critical to the nation as a whole that it is deserving of this Court's additional jurisdictional consideration.

D. THE MARTINS' BRIEF IN OPPOSITION RELIES SOLELY ON JURISDICTIONAL OBJECTIONS AND HAVING FAILED TO URGE ANY OTHER GROUNDS, THE MARTINS SHOULD BE DEEMED TO HAVE WAIVED OBJECTION TO THE QUESTIONS PRESENTED BY INTERSTATE.

Objections to consideration of questions presented "may be deemed waived unless called to the Court's attention in the brief in opposition." *Supreme Court Rule* 15 (2). In their Brief in Opposition to Interstate's Petition, the Martins raise only jurisdictional questions and urge no other grounds in opposition to the Court's grant of Interstate's Petition For Writ of Certiorari. Having failed to object to or address the questions presented by Interstate, the Martins should be deemed to have waived any objections. *See*, *Schiro v. Farley*, 114 S. Ct 783, 510 U.S. 222, *rehearing denied*, 114 S. Ct. 1341, 510 U.S. 1215 (1994); *South Cent. Bell Tel. Co. v. Alabama*, 119 S. Ct. 1180, 143 L. Ed. 2d 258 (1999).

CONCLUSION

Equal justice under the law is the entitlement of every citizen. That entitlement reaches from the threshold of the first tribunal to every succeeding threshold we cross in search of it. In some instances, such as this, that search brings us to this Court's threshold. As citizens we have the right to expect that the law will do all that is needed, but according to Justice Holmes, " . . . the law does all that is needed when it does all that it can." *Buck v. Bell*, 274 U.S. 200, 208 (1927). The law has not yet done all that is needed in this cause. Only if this Court grants Certiorari will the law have done all that it can. And so, for the reasons urged previously and herein, Petitioner respectfully requests the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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